Woodman's Food Markets, Inc. *and* United Food & Commercial Workers Union Local 1444, Chartered by the United Food & Commercial Workers International Union, AFL–CIO, CLC, Petitioner. Case 30–RC–5935

September 29, 2000

DECISION AND ORDER REMANDING

BY CHAIRMAN TRUESDLAE AND MEMBERS FOX, LIEBMAN, AND HURTGEN

The National Labor Relations Board has considered objections to an election held on September 25, 1997, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 36 for, and 49 against the Petitioner, with 7 challenged ballots,[1] an insufficient number to affect the results of the election.

Having carefully reviewed the entire record, including the Employer's exceptions and brief, we adopt the hearing officer's findings and recommendations only to the extent consistent with this decision.[2] The issue in this case is whether the Employer's omission of names of eligible voters from its *Excelsior*[3] list is grounds for setting aside the election. As the Board has recently held, "employees have a Section 7 right to make a 'fully-informed' choice in an election, and . . . the purpose of the *Excelsior* rule is to protect that right."[4] Given this critical purpose of the *Excelsior* list, we have reexamined our case law on this issue. As explained below, we find that, in determining whether an employer has substantially complied with the *Excelsior* requirements, the Board must consider not only the number of names omitted from the *Excelsior* list as a percentage of the electorate, but also other factors, including the potential prejudicial effect on the election as reflected by whether the omissions involve a determinative number of voters and the employer's reasons for omitting the names.

On September 8, 1997, the Employer submitted an *Excelsior* list containing the names of employees eligible to vote. It is undisputed that the names of 12 eligible employees were omitted from that list. Four of these names were omitted based on the Employer's admittedly incorrect interpretation of the payroll eligibility requirement. As for the remainder of the omitted names, the only explanation given in the record is by the Employer's human resources representative, Kathy Klein, who testified that "[i]t could have been [the result of] errors within the payroll department."

On or about September 21 or 22, the Employer sent another list which deleted the names of some employees who had been terminated since the September 8 list. The September 21 list still omitted the 12 eligible employees.

At the election, the Board agent challenged the ballots of 19 voters because their names were not on the *Excelsior* list. Before the tally of ballots, the parties resolved 12 of these challenges: they agreed that 7 voters[5] were ineligible and that their ballots would not be counted and that 5 voters[6] were eligible and that their ballots would be opened and counted. Seven challenged ballots remained unresolved: five of them were cast by Michael Fisher, Sirajul Jackson, Kelly Kreuser, Rae-Ann Lass, and Jacob Zizzo, part of the group of 12 employees whose names were omitted from the list. The remaining two unresolved challenged ballots were cast by David Keesey and Theresa Keesey, whose names were not included on the *Excelsior* list apparently because the Employer believed that they were statutory supervisors.

At the hearing, the parties stipulated that the following 12 eligible voters were omitted from the *Excelsior* list: Sirajul Jackson, Rae-Ann Lass, Tara McGraw, Brenda Rasibeck, Christopher Schenck, Mark Smith, Jennifer Vargas, Jacob Zizzo, Kelly Kreuser, Lena Haslage, Michael Fisher, and Mark Neeson.[7] The parties also stipulated that these 12 omissions constituted 6.8 percent of the eligible voters.[8]

Under the Board's *Excelsior* rule, an employer must file with the Regional Director an election eligibility list containing the names and addresses of all eligible voters within 7 days after approval by the Regional Director of an election agreement or after a Direction of Election, and no extension of time is granted except in extraordinary circumstances. *Excelsior Underwear*, 156 NLRB 1236 (1966). The *Excelsior* rule is not intended to test employer good faith or "level the playing field" between

[1] The seven ballots, challenged by the Board agent because the voters' names did not appear on the *Excelsior* list, were cast by Michael Fisher, Sirajul Jackson, David Keesey, Theresa Keesey, Kelly Kreuser, Rae-Ann Lass, and Jacob Zizzo.

[2] In the absence of exceptions, we adopt pro forma the hearing officer's recommendation to overrule the Union's Objection 3. Objections 1, 2, 5, and 6 were withdrawn prior to the hearing.

[3] *Excelsior Underwear*, 156 NLRB 1236 (1966).

[4] *Thiele Industries*, 325 NLRB 1122 (1998).

[5] The seven were Fashawn Brown, Jenny Flaig, James Ludwin, Jeremy Moore, Tony Retana, Nicholas Shear, and Cynthia Winburn.

[6] The five were Josh Cairo, Lena Haslage, Mark Nelson, Chris Schenck, and Jennifer Vargas.

[7] The parties also stipulated that 16 employees listed on the *Excelsior* list had severed their employment before the submission of the list and were thus ineligible voters.

[8] The hearing officer rejected this stipulation and found that there were in fact 34 names omitted and thus the percentage of names omitted was 20.7 percent. Based on this higher percentage, the hearing officer further found that the Employer acted in bad faith. We do not rely on these findings of the hearing officer.

petitioners and employers, but to achieve important statutory goals by ensuring that all employees may be fully informed about the arguments concerning representation and can freely and fully exercise their Section 7 rights. *Mod Interiors, Inc.*, 324 NLRB 164 (1997), citing *North Macon Health Care Facility*, 315 NLRB 359, 360–361 (1994). Accordingly, the Board requires that the information in the *Excelsior* list be not only timely but complete and accurate so that the union may have access to all eligible voters.

In deciding whether an employer's noncompliance with the *Excelsior* rule warrants setting aside the election, the Board has repeatedly stated that the *Excelsior* rule is not to be "mechanically applied." *Telonic Instruments*, 173 NLRB 588, 589 (1968) (citations omitted). The Board, however, has also recognized that the potential harm from omissions is sufficiently great to warrant an approach that encourages a conscientious effort by employers to comply with the *Excelsior* requirements. *Thrifty Auto Parts,* 295 NLRB 1118 (1989). Accordingly, the Board has looked to whether or not, under the circumstances of a particular case, the employer has "substantially complied" with the *Excelsior* requirements. *Gamble Robinson Co.*, 180 NLRB 532 (1970); *Sonfarrel, Inc.*, 188 NLRB 969 (1971). In the absence of a showing of bad faith,[9] this analysis has traditionally involved simply calculating the number of omissions as a percentage of the total number of eligible voters. As explained below, however, we find that this approach fails to adequately effectuate the statutory purposes underlying the *Excelsior* rule by failing to also consider other factors.

The Board has consistently viewed the omission of names from the eligibility list as a serious matter because a party that is unaware of an employee's name suffers an obvious and pronounced disadvantage in communicating with that person by any means. *Women in Crisis Counseling*, 312 NLRB 589 (1993). See also *Thrifty Auto Parts,* supra. Thus, the omission of names from the eligibility list clearly frustrates the policies underlying the *Excelsior* rule since the union may be denied the opportunity prior to the election to inform these voters of its position on the issues raised before the election. The Board has also long recognized that the closeness of the vote is a significant factor in *Excelsior* cases. *Ben Pearson Plant*, 206 NLRB 532, 533 (1973); *Mod Interiors*, 324 NLRB at 164.

Nevertheless, in applying the "substantial compliance" rule, the Board in some cases has declined to set aside the election on the ground that the number of omissions constituted only a small percentage of the total number of eligible voters, even though the number of omissions involved a determinative number of voters. See, e.g., *Kentfield Medical Hospital*, 219 NLRB 174, 175 (1975)(finding that omission of 5 names out of 82 eligible voters, or 6%, did not warrant setting aside election notwithstanding that union lost by only 3 votes).

We find that this approach[10]—which focuses solely on the percentage of omissions relative to the number of employees in the unit—fails to adequately effectuate the purposes of the *Excelsior* rule. Accordingly, while we will continue to consider the percentage of omissions, we will consider other factors as well, including whether the number of omissions is determinative, i.e., whether it equals or exceeds the number of additional votes needed by the union to prevail in the election, and the employer's explanation for the omissions.

With respect to whether the omissions involve a determinative number of voters, we note that the Board's *Excelsior* policy was designed to enhance the availability of information and arguments both for and against union representation to employees so that they might render a more informed judgment at the ballot box. Thus, the proper focus in determining whether an employer has complied with the requirements of the *Excelsior* rule should be on "the degree of prejudice to these channels of communication, and not the degree of employer fault." *Avon Products,* 262 NLRB 46, 48 (1982). Obviously, the potentially prejudicial effect on the election is most clear where the number of omissions may have compromised the union's ability to communicate with a determinative number of voters. To ignore this circumstance, therefore, is not only inconsistent with the rule's purpose but makes little sense. Accordingly, we overrule our prior cases to the extent they have done so and hold that whether the omissions involve a determinative number of names must be considered in determining whether to set aside the election.[11]

With respect to the employer's explanation for the omissions, we note that omissions may occur, notwith-

[9] Although a finding of bad faith is not a precondition for a finding that an employer has failed to comply substantially with the *Excelsior* rule, the Board has held that a finding of bad faith will preclude a finding that an employer was in substantial compliance with the rule. *North Macon Health Care Facility*, supra; *Bear Truss, Inc.*, 325 NLRB 1162 fn. 3 (1998). We agree with and reaffirm this Board policy.

[10] Cf. *EDM of Texas*, 245 NLRB 934 fn. 1 (1979) (10-percent omissions does not constitute substantial compliance); *Gamble Robinson Co.*, 180 NLRB 532 (1970) (11-percent omissions does not constitute substantial compliance).

[11] We do not reach in this case whether the policy adopted here with respect to the omission of names should also apply to incorrect addresses.

standing an employer's reasonable good-faith efforts to comply, due to uncertainties about who is an eligible unit employee or other factors. Thus, we will consider the employer's explanation for the omissions.[12]

Here, the percentage of omissions was relatively small and, standing alone, might not warrant setting aside the election. We find, however, that the Union may have suffered substantial prejudice by its inability to communicate with these 12 employees since ballots cast by these employees *could have affected* the outcome of the election. We recognize that the Union lost the election by 13 votes. However, in view of the additional challenged voters, David Keesey and Theresa Keesey (whose names were also omitted from the eligibility list because the Employer believed they were supervisors), the 12 omitted names could be determinative in this case.

We further find that the Employer has not presented a legally sufficient justification for its omission of the 12 names. In this regard, we note that the Employer incorrectly interpreted the payroll eligibility requirement and that the Employer's payroll department may have committed errors. Although this does not show bad faith, it does show a lack of diligence and due care by the Employer.[13]

Accordingly, we shall remand this proceeding to the Regional Director for a determination as to the Keeseys' eligibility. If it is determined that they are ineligible, the omitted names are not determinative and the results of the election should be certified. If, however, they are eligible voters, the omission of the 12 names from the E*xcelsior* list could have affected the outcome of the election and the direction of a second election is warranted.[14]

ORDER

It is ordered that this proceeding is remanded to the Regional Director for Region 30 to investigate and determine the eligibility of David Keesey and Theresa Keesey and for further appropriate action consistent with this decision.

[12] As noted above, if the employer acted in bad faith, that is the end of the inquiry, and the election will be set aside. We hold here that, absent bad faith, an employer's explanation will be considered as *a factor* in the analysis.

[13] We also note that the Employer included on the *Excelsior* list the names of 16 employees who had quit prior to the Employer's submission of the list to the Regional Director. While we find that such conduct shows a lack of diligence by the Employer in compiling the list, we find it unnecessary to rely on this conduct.

[14] Under the circumstances of this case, we will not direct that the ballots of the Keeseys be opened if they are found to be eligible voters.